Supreme Court, U.S.
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No. 02-367

IN THE

Supreme Court of the United States

AMERICAN CYANAMID COMPANY,
Petitioner,

v.

TERRY GEYE *and* BRANDON GEYE,
Respondents.

On Petition For A Writ of Certiorari To The Supreme Court of Texas

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PETITIONER'S SECOND SUPPLEMENTAL BRIEF

LAWRENCE S. EBNER
Counsel of Record
CHRISTINA M. CARROLL

McKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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PETITIONER'S SECOND SUPPLEMENTAL BRIEF[1]

Pursuant to Sup. Ct. R. 15.8, Petitioner American Cyanamid Company hereby submits this Second Supplemental Brief in further support of its petition for a writ of certiorari. The purpose of this supplemental brief is to respond to Public Citizen Litigation Group's assertion in *Eyl v. Ciba-Geigy Corp., petition for cert. filed*, 71 U.S.L.W. 3668 (U.S. Apr. 10, 2003) (No. 02-1500), that *Eyl* is a better vehicle for review than the instant appeal, *American Cyanamid Company v. Geye.*

As Cyanamid has previously explained, *all nine* federal circuits that have considered FIFRA pre-emption in light of *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), have held that § 136v(b) expressly pre-empts state law failure-to-warn and other labeling-related damages claims against pesticide manufacturers. *See Geye* pet. at 10 n.2 (collecting cases); *see also Eyl v. Ciba-Geigy*, 650 N.W.2d 744, 751 (Neb. 2002) ("After the decision in *Cipollone* . . . every federal court of appeals to address the issue has held that common-law labeling-based failure-to-warn claims brought against manufacturers of pesticides or herbicides are preempted by FIFRA.") (collecting cases). Further, with one exception, there is unanimity among state supreme courts (including the Texas Supreme Court) on this fundamental principle. *See, e.g., Etcheverry v. Tri-Ag Serv., Inc.*, 993 P.2d 366 (Cal. 2000); *Quest Chem. Corp. v. Elam*, 898 S.W.2d 819 (Tex. 1995); *see also Geye* pet. at 12 (collecting additional cases but noting the aberrant holding in *Sleath v. West Mont Home Health Servs., Inc.*, 16 P.3d 1042

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[1] The amended Rule 29.6 corporate disclosure statement filed with Petitioner's Supplemental Brief remains accurate.

(Mont. 2000), *cert. denied*, 122 S. Ct. 40 (2001)); *Eyl*, 650 N.W.2d at 751 ("numerous state appellate courts hold that FIFRA preempts labeling-based common-law causes of action") (collecting cases). Thus, "[t]he overwhelming majority of jurisdictions hold that FIFRA preempts state common-law failure-to-warn claims." *Eyl*, 650 N.W.2d at 754 (declining to overturn prior FIFRA pre-emption precedent).

The quite different question presented here is whether there is a gaping *exclusion* from FIFRA pre-emption for failure-to-warn claims involving subjects – such as prevention of agricultural crop damage – which EPA normally does not review when it initially approves a pesticide product's labeling. As Cyanamid's petition and the subsequent briefs filed in support of the petition discuss, the supreme courts of the nation's two largest agricultural states, Texas and California, are irreconcilably split on this important issue. So are the Texas Supreme Court and the U.S. Court of Appeals for the Fifth Circuit. *See Geye* pet. at 8-14; CropLife America *Amicus* Br. at 8-13; Petitioner's Reply Br. at 6-9.

After Cyanamid's petition was filed, the Court denied the petition filed by Public Citizen on behalf of a personal injury plaintiff in *Netland v. Hess & Clark*, 284 F.3d 895 (8th Cir.), *cert. denied*, 123 S. Ct. 415 (2002). The *Netland* petition had requested the Court to review the Eighth Circuit's refusal to overturn its previous opinions holding that § 136v(b) of FIFRA expressly pre-empts pesticide labeling-related requirements imposed by state law failure-to-warn claims. Now, in its virtually identical petition in *Eyl*, another personal injury case, Public Citizen again has proffered its theories against FIFRA pre-emption – theories which Public Citizen has repeatedly advocated and federal and state appellate courts have repeatedly rejected. *See, e.g., Lescs v. William R. Hughes, Inc.*, 168 F.3d 482 (4th Cir.

1999) (Table), unpub. op. avail. at No. 97-2278, 1999 WL 12913, *cert. denied*, 528 U.S. 1119 (2000); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *Etcheverry v. Tri-Ag Serv., Inc.*, 993 P.2d 366 (Cal. 2000); *Jenkins v. Amchem Prods., Inc.*, 886 P.2d 869 (Kan. 1994), *cert. denied*, 516 U.S. 820 (1995); *Banks v. ICI Americas, Inc.*, 450 S.E.2d 671 (Ga. 1994); *see also Netland, supra*; *Schuver v. E.I. Du Pont de Nemours & Co.*, 546 N.W.2d 610 (Iowa), *cert. denied*, 519 U.S. 910 (1996).

As it did in *Netland*, Public Citizen in *Eyl* again is urging the Court to review, despite the near unanimity among the lower courts, the well established principle that FIFRA expressly pre-empts failure-to-warn and other labeling-related damages claims. There is no more reason for the Court to grant review in *Eyl* than there was in *Netland*.[2]

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[2] The *Eyl* petition asserts that the plaintiff there did not assist in the application of the pesticide. *See Eyl* pet. at 8, 13. But that fact is immaterial to pre-emption: The overwhelming majority of FIFRA pre-emption cases do not distinguish between claims against pesticide manufacturers brought by pesticide applicators or users and those brought by so-called bystanders. *See, e.g., Lescs v. William R. Hughes, Inc., supra* (claim by homeowner whose residence was treated with a pesticide); *Cuevas v. E.I. Du Pont de Nemours & Co.*, 956 F. Supp. 1306 (S.D. Miss. 1997) (claim by truck driver who alleged that he was accidentally sprayed by a pesticide being applied to the roadside); *Traube v. Freund*, 775 N.E.2d 212 (Ill. App. Ct. 2002) (claim by pond owner who alleged that his trophy-grade bluegill fish were killed by runoff from a pesticide applied to neighboring farmland); *Ackles v. Luttrell*, 561 N.W.2d 573 (Neb.), *cert. denied*, 118 U.S. 329 (1997) (claim by mail carrier who alleged that he was exposed to a pesticide being sprayed on an adjacent cornfield); *June v. Laris*, 618 N.Y.S.2d 138 (N.Y. App. Div. 1994) (claim by fire fighter who alleged that he was accidentally exposed

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The *Eyl* petition acknowledges that "[t]he appellate courts are . . . divided on . . . whether FIFRA preempts a pesticide user's state-law failure-to-warn claim that a pesticide was not effective for its intended use, *e.g.*, a farmer's claim that a FIFRA-registered pesticide's ineffectiveness resulted in crop damage." *Eyl* pet. at 19. According to the *Eyl* petition, however, "[a] grant of certiorari here [in *Eyl*] would, if ultimately decided in petitioner Eyl's favor, necessarily resolve the conflict in the crop-damage cases." *Id.* at 19-20.

But if the Court were to grant review in *Eyl* and then affirm the Nebraska Supreme Court's unsurprising reconfirmation of the principle that FIFRA pre-empts failure-to-warn claims, that would leave *completely unresolved* the question presented here – whether there is an exception to that principle for failure-to-warn claims involving agricultural crop damage or other subjects which EPA does not normally review at the time it initially approves a pesticide product's labeling.

The *Eyl* petition nevertheless asserts in a footnote that it is "a better vehicle" for review than *Geye* because it "provides a basis for deciding the broader, more important,

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to a pesticide that was being applied on a farm); *Eriksen v. Mobay Corp.*, 41 P.3d 488 (Wash. Ct. App. 2002) (claim by farmer who alleged that he suffered personal injuries caused by aerial drift from a pesticide application on a neighboring farm); *Hue v. Farmboy Spray Co.*, 896 P.2d 682 (Wash. 1995) (claim by landowners who alleged that agricultural pesticides drifted onto their homes and farms damaging their plants and crops).

question whether FIFRA expressly preempts *any* failure-to-warn claims, not just those based on product efficacy." *Eyl* pet. at 20 n.7. But as discussed above, there is virtually no conflict among the lower courts on that "broader question." Further, the basic principle that FIFRA pre-empts failure-to-warn and other labeling-related damages claims necessarily is implicated by the more focused, "exception to pre-emption" issue presented here, where there indisputably is a deep and intolerable split of authority.

Public Citizen's assertions that review in *Eyl* also is warranted in light of the arguments against FIFRA pre-emption contained in a March 1999 *amicus curiae* brief filed on behalf of EPA in *Etcheverry v. Tri-Ag Serv., Inc.* are misplaced. Those arguments were repudiated by the California Supreme Court. *See* 993 P.2d at 371-77. Moreover, they have had no impact on the vast majority of other courts when invoked by plaintiffs in subsequent cases. *See, e.g., Eyl*, 650 N.W.2d at 753-54 ("we give no deference to the EPA's position in the amicus brief filed in Etcheverry . . . the California Supreme Court did not adopt the EPA's arguments"); *Netland*, 284 F.3d at 899 (rejecting plaintiff's request, based on EPA *Etcheverry amicus* brief, to overturn prior FIFRA pre-emption precedent); *Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1199, 1207 (9th Cir. 2002) ("The California Supreme Court found the EPA's position in the main both unsupported by the relevant law and unpersuasive in its substance, noting that the EPA's views went against the holdings of [nine] federal circuit courts of appeal.").

Most recently, in *Anderson v. Dow AgroSciences LLC*, No. CIV-01-1939-HE (W.D. Okla. May 14, 2003), farmers alleged that a herbicide caused phytotoxic injury to their peanut crops. Slip op. at 2. Deepening the split of authority created by *Geye*, an Oklahoma district court held that "given the scope of the FIFRA preemption as interpreted by the Tenth Circuit . . . and most other courts," *Geye*'s

"distinction" (i.e., exemption for failure-to-warn claims involving subjects that "the EPA did not actually evaluate") is "not dispositive here." *Id.* at 8 n.12. More specifically, the court found that the plaintiffs' "claims of negligence, breach of express and implied warranties, deceptive trade practices, fraud and negligent representation can essentially be characterized as failure to warn claims *subject to preemption under FIFRA.*" *Id.* at 11 (emphasis added). As to the plaintiffs' reliance on the EPA *amicus* brief in *Etcheverry*, the court noted that the California Supreme Court "reject[ed] the EPA's argument." *Id.* at 8 n.13.

Significantly, in *American Cyanamid Company v. Geye*, this Court for the first time has invited the Solicitor General to express the views of the United States on the subject of FIFRA tort pre-emption. That in itself is a compelling reason why Cyanamid's petition for a writ of certiorari should be granted.

Respectfully submitted,

LAWRENCE S. EBNER
Counsel of Record
CHRISTINA M. CARROLL

McKENNA LONG &
ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Attorneys for Petitioner

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